

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENSON ALLEN LUCAS, JR.,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2014

No. 316588

Wayne Circuit Court

LC No. 12-006253-FH

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Benson Allen Lucas, Jr., appeals by right his bench convictions of larceny with a value of more than \$1,000 but less than \$20,000, MCL 750.356(3)(a), felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Lucas as a fourth-offense habitual offender, MCL 769.12, to serve 20 months to 10 years in prison for the larceny conviction, 14 months to 10 years in prison for the felon in possession of a firearm conviction, 1 to 15 years in prison for the felonious assault conviction, and 2 years in prison for the felony-firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

Lucas first argues that the trial court erred when it permitted an expert on forensic video examination, Ron Gibson, to offer an opinion as to whether the person who appeared in a video matched Lucas' mug shot. At trial, Lucas' lawyer agreed that Gibson was qualified to testify as an expert on videos. Therefore, to the extent that this claim of error involves Gibson's qualifications to testify as an expert on video evidence, Lucas waived that claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 206 (2000). To the extent that Lucas claims Gibson's testimony was improper on some other ground, because Lucas' trial lawyer did not object when Gibson offered his testimony, we shall review it for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, evidence that is relevant is admissible except as otherwise provided by either the state or the federal constitution or by court rule. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Under MRE 701, a lay witness may offer an opinion if the opinion is "(a) rationally based on the perception of the witness" and "(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

In *People v Fomby*, 300 Mich App 46, 49-52; 831 NW2d 887 (2013), this Court addressed whether testimony by a certified video forensic technician regarding the identity of individuals in still photographs and surveillance footage was properly admitted as lay opinion testimony. In *Fomby*, the police officer's testimony identified individuals depicted in still-frame photographs, taken from a surveillance video, as the same individuals in the video. *Id.* at 49. The police officer testified that he watched the video footage, produced short clips of the individuals, and isolated certain frames to create still images. *Id.* at 50-51. On the basis of his scrutiny of the video surveillance footage and the still images he created from the video, the police officer provided his opinions regarding the identity of individuals within the video as compared to the still images from portions of the video. *Id.* at 51.

After reviewing the relevant federal law, the Court held that the police officer's testimony was lay witness opinion testimony. *Id.* at 50. The Court further noted that even if the police officer's qualifications as a forensic video technician do not extend to the comparison and identification of individuals within still photographs made from video, the testimony was still properly admitted as lay opinion testimony because his opinion was rationally based on his perception of the video and still photos and his opinion was helpful. *Id.* at 50-51.

This case is analogous to *Fomby*. Notably, the testifying police officer in both *Fomby* and this case was Gibson. In both cases, he essentially conducted a photographic comparison and provided testimony regarding his observations and opinions. Here, Gibson first isolated a single frame from the Channel 2 News footage and compared the single frame image to Lucas' mug shot. Gibson then provided his opinion regarding the similarities and differences in the physical features between the two images. Gibson's testimony in *Fomby* and his testimony in this case are parallel. Just as he presented lay opinion testimony in *Fomby*, Gibson also presented his lay opinion here. *Id.* at 50. Gibson's testimony was rationally based on his perception because he reviewed the news footage numerous times to isolate the best single image frame and formulate his opinion. See *id.* at 50-51. Accordingly, Gibson's testimony was properly admitted as lay opinion testimony.

Lucas also contends that his lawyer's failure to object to Gibson's testimony amounted to ineffective assistance. Because there was no hearing on this issue, our review is limited to mistakes that are apparent on the record alone. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In order to establish a claim of ineffective assistance of counsel, Lucas must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional error, the result of the proceeding would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012). In addition, Lucas must demonstrate that, given the totality of the evidence presented at trial, there is a reasonable probability that the outcome would have been different. *Id.*

As we have already determined, Gibson's testimony was properly admitted as lay opinion testimony. As such, his lawyer cannot be faulted for failing to object. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, it is clear from a review of the record that the trial court did not rely on Gibson's identification. The trial court noted that Gibson could

not make a positive identification. The trial court further stated that it could not identify Lucas from the video: “I’ll just say for the record, I couldn’t tell, I couldn’t tell whether that person [in the Channel 2 News video] was the Defendant or not. I just didn’t think the video was clear enough in terms of the quality of the shot.” Nevertheless, the trial court found that Lucas was the perpetrator on the sole basis of Donald Leese’s eyewitness identification. Accordingly, Lucas cannot establish that there is a reasonable probability that the outcome would have been different had Gibson’s testimony been precluded. *Gioglio*, 296 Mich App at 22.

Lucas also contends that his convictions are against the great weight of the evidence. Lucas does not, however, challenge any of the elements of the various charges other than his identification as the perpetrator who brandished a firearm. Specifically, he maintains that his identification was contrary to the great weight of the evidence because it was based on conflicting and incredible testimony. In a bench trial, this Court reviews the trial court’s findings of fact under the clearly erroneous standard, giving consideration to the special opportunity of the trial court to judge the credibility of the witnesses. MCR 2.613(C); *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The determination of whether a verdict is against the great weight of the evidence requires this Court to review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). A verdict is against the great weight of the evidence if “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

With respect to whether a new trial is warranted on the basis that the verdict was against the great weight of the evidence, “[c]onflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Absent exceptional circumstances, the issue of witness credibility and the weighing of conflicting testimony should be left to the trier of fact. *Lemmon*, 456 Mich at 642-643. The exceptional circumstances recognized in *Lemmon* are: (1) the testimony contradicts indisputable physical facts or laws; (2) the testimony is patently incredible or defies physical realities; (3) the testimony is so inherently implausible that it could not be believed by a reasonable juror; or (4) the testimony has been seriously impeached and the case is marked by uncertainties and discrepancies. *Id.* at 643-644.

In this case, the primary issue came down to identity, which is an element of every crime. See *Yost*, 278 Mich App at 356. At trial, Leese testified that Lucas was one of the three men involved. He testified that he saw Lucas with two other individuals inside his storage lot. He saw the three men attaching a trailer to a red Dodge pickup truck. According to Leese, Lucas and the two other men scurried out of the storage lot as he pulled his tow truck into the lot. Leese immediately inspected the storage lot and noticed a boat trailer belonging to Ed Magnuson missing. He also noticed that a dual axle trailer, a power washing trailer, a car dolly and several other trailers belonging to another patron were missing. Magnuson confirmed that his boat trailer was stolen from the lot. Leese also testified that, at some point, Lucas returned to the storage lot and pointed a gun at him.

Lucas testified and denied that he was involved in the larceny from Leese's lot. He stated that he was working from 8:00 a.m. to 6:00 p.m. on the day at issue. Adrienne Hazel testified that Lucas signed in to work on the day at issue, but Hazel did not know what time Lucas completed his last assignment. In addition, Lucas' father, who pleaded guilty to his involvement in the larceny, testified that his son was not involved.

Despite Lucas' argument that inconsistent and conflicting testimony entitles him to a new trial, conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Unger*, 278 Mich App at 232. This case does not involve any exceptional circumstance as recognized in *Lemmon* that would justify disturbing the trial court's findings. See *Lemmon*, 456 Mich at 643-644. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Therefore, Lucas is not entitled to a new trial.

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Kelly